

UNITED STATES
v.
CURTIS L. WILLSIE

IBLA 2001-175

Decided August 7, 2001

Application for an award of fees and expenses under the Equal Access to Justice Act for participation in mining claim contest AZA-23448-1 culminating in the issuance of United States v. Curtis L. Willsie, 152 IBLA 241 (2000).

Referred to Hearings Division.

1. Equal Access to Justice Act: Generally

According to the regulations governing the filing of applications for the award of fees and expenses under the Equal Access to Justice Act, such an application must be filed with the "adjudicative officer," who is defined by the regulations as "the official who presided at the adversary adjudication." 43 CFR 4.602(c). When the adversary adjudication in question is a mining claim contest hearing, the application must be filed with the Hearings Division, Office of Hearings and Appeals, and, when the application is filed with the Board of Land Appeals, it will be referred to the Hearings Division for consideration.

APPEARANCES: Jerry L. Haggard, Esq., Phoenix, Arizona, for Curtis L. Willsie; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On May 8, 2000, the Board issued its decision in United States v. Willsie, 152 IBLA 241. Therein, the Board reversed the order of Administrative Law Judge S.N. Willett dismissing mining contest complaint AZA-3448-1 based on her finding that the Bureau of Land Management (BLM) had failed to establish a prima facie case of the invalidity of four association placer mining claims (C&W Nos. 1, 12, 15, and 16). While the Board held that BLM had presented a prima facie case of invalidity, it concluded, based on its de novo review of the record, that Curtis L. Willsie had overcome BLM's prima facie case by a preponderance of the evidence. Accordingly, the Board dismissed the contest complaint. In

an order dated February 20, 2001, the Board denied BLM's motion for limited reconsideration of that decision.

On March 19, 2001, the Board received from Willsie an application for an award of fees and expenses filed pursuant to the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (1994), and Departmental regulations at 43 CFR Part 4, Subpart F.

Section 203(a)(1) of the EAJA, 5 U.S.C. § 504(a)(1) (1994), provides for the award of attorney fees and expenses to the prevailing party in an "adversary adjudication." The EAJA defines the term "adversary adjudication" as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1994); see also 43 CFR 4.602(b). By its terms 5 U.S.C. § 554 (1994) applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," subject to certain exceptions not relevant here. The definition of "adversary adjudication" in 43 CFR 4.603(a) parallels the language of section 554, and adds: "These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554." Although in Collord v. United States Department of the Interior, 154 F.3d 933, 936 (9th Cir. 1998), the Government took the position that EAJA did not apply to mining claim contest proceedings because a formal hearing pursuant to 5 U.S.C. § 554 is not required by the General Mining Law of 1872, the court disagreed, stating that "[t]he [mining claim contest] proceeding in this case is governed by § 554 of the APA [Administrative Procedure Act]." Thus, fees and expenses are available under the EAJA to mining claim contestees in the proper circumstances.

[1] However, Departmental regulations govern the filing of applications under the EAJA. Those regulations provide at 43 CFR 4.612 that an application under the EAJA must be filed with "the adjudicative officer." The statute defines "adjudicative officer" as "the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication." 5 U.S.C. § 504(b)(1)(D) (1994). Following the statute, the regulations define the "adjudicative officer" as "the official who presided at the adversary adjudication." 43 CFR 4.602(c). The adversary adjudication in this case was the mining claim contest hearing at which Administrative Law Judge S.N. Willet presided. In addition, the regulations provide for taking an appeal from the decision of the adjudicative officer to the Board of Land Appeals. 43 CFR 4.617. In Benton C. Cavin, 93 IBLA 211, 213 (1986), a case involving an application for fees and expenses under EAJA, the Board recognized that an appeal to the Board would be impossible if the Board were also the adjudicative officer, and stated: "[I]t is clear that it was not contemplated that the Board would ever be deemed the adjudicative officer." 1/

We must conclude that Willsie has filed his application in the

wrong forum. 2/ Therefore, we will refer this application to the Hearings Division in Salt Lake City, Utah, for assignment of an Administrative Law Judge to act as the adjudicative officer to consider the application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Willsie's application for an award of fees and expenses is referred to the Hearings Division, Salt Lake City, Utah, as described.

Bruce R. Harris
Deputy Chief, Administrative Judge

I concur:

David L. Hughes
Administrative Judge

1/ Despite the fact that Cavin filed his EAJA application with the Board, the Board accepted the matter to expedite ultimate decision making because it was clear that BLM would deny the application and that Cavin would pursue an appeal. Such is not the situation in this case.

2/ We note that the adjudicative officer of record is no longer with the Department of the Interior. While that factor may make review of the application more difficult, the regulations control.

